Supreme Court, U.S.
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No. 95-841

In The

Supreme Court of the United States

October Term, 1995

ALBERT AKINS, ET AL.,

Petitioners,

vs.

ZENECA, INC.; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS RHONE-POULENC, INC. AND RHONE-POULENC BASIC CHEMICALS COMPANY IN OPPOSITION

WILLIAM N. OZIER
2700 First American Center
Nashville, Tennessee 37238
615/742-6232
Attorney for Respondents Rhone-Poulenc, Inc. & Rhone-Poulenc Basic Chemicals Company

OF COUNSEL:
BASS, BERRY & SIMS
Nashville, Tennessee

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Although the petitioners state four pages of Questions Presented, the respondents, Rhone-Poulenc, Inc. and Rhone-Poulenc Basic Chemicals Co. (the "Rhone-Poulenc Respondents"), assert that the only questions properly presented by the Petition for Certiorari are:

1. Whether the Court of Appeals properly ruled that the respondents, International Union of Operating Engineers, AFL-CIO, and Local 912, International Union of Operating Engineers, AFL-CIO, did not breach their duty of fair representation to the petitioners.

2. Whether the Court of Appeals properly concluded that there was no factual basis for plaintiff's conspiracy claims.

3. Whether the Court of Appeals properly concluded that the release signed by certain of the petitioners precluded their claims against the Rhone-Poulenc Respondents.

4. Whether the Court of Appeals correctly concluded that there was no breach of the International Union of Operating Engineers' Constitution.[1]

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[1] The Rhone-Poulenc Respondents do not respond to this issue since the disposition of this issue does not bear on the liability of these respondents.

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BRIEF OF RESPONDENTS, RHONE-POULENC, INC. AND RHONE-POULENC BASIC CHEMICALS CO. IN OPPOSITION

OPINIONS BELOW

Petitioners have correctly stated the status of the opinions of the United States District Court for the Middle District of Tennessee and the United States Court of Appeals for the Sixth Circuit, both of which are included in the Appendix (A-128; A-1).

JURISDICTION

The Rhone-Poulenc respondents admit the basis upon which the petitioners seek certiorari from this Court but deny that this case presents issues over which this Court should assert jurisdiction.

STATUTE INVOLVED

Petitioners' primary claim is based on Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 185. Petitioners' other claims are based on common law theories under the law of the State of Tennessee.

STATEMENT OF THE CASE

The Rhone-Poulenc Respondents accept Petitioner's statement of the essential facts regarding the historical

background upon which this case arose. The Respondents dispute Petitioners' reliance on an internal memorandum written by an employee of the respondent, Rhone-Poulenc Basic Chemicals Co., on September 13, 1988 (Petition at pp. 5-6) since that document was not admitted into evidence by the District Court and the Court of Appeals held that the District Court's decision not to admit that document into evidence was not error.[2] (A-28-9).

The Rhone-Poulenc Respondents also dispute the petitioners' characterization of the declaratory judgment action brought by respondent, Local 912 of the International Union of Operating Engineers ("Respondent Local Union") as a "friendly lawsuit" or any reliance on that action to support their conspiracy claim under state law. (Petition at p. 8). The parties had engaged in extensive written discovery in that proceeding and, in fact, had scheduled discovery depositions for the day following the date on which members of Respondent Local 912 employed by the defendant, Zeneca, Inc. (formerly ICI Americas, Inc.), had voted to ratify a new collective bargaining agreement which eliminated the cross-bumping agreement from that company's collective bargaining agreement. The Rhone-Poulenc Respondents submit that no basis exists for finding a "conspiracy" among the

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[2] Petitioners' characterization of that document is itself erroneous. The memorandum does not constitute an "admission" of liability but recognizes only the potential for claims from disappointed employees which is, in fact, what resulted in this action. The memorandum was written by a representative of the Respondent, Rhone-Poulenc Basic Chemicals Co., who was not an attorney and certainly did not constitute a "legal" analysis of the respondents' obligations to any of its employees.

Respondents in this case based on their actions in that proceeding.

Grievances were filed under the terms of the collective bargaining agreement between the Respondent, Rhone-Poulenc Basic Chemicals Co. and Respondent Local 912 by employees laid off from the Rhone-Poulenc furnace plant in August of 1991. In response to those grievances, Rhone-Poulenc provided the forms for its laid-off employees to assert their claims to transfer to the Zeneca organic plant. Rhone-Poulenc did not, at any time, refuse or fail to process any grievance. No request was ever made by Local 912 that any grievance be referred to final and binding arbitration under the terms of the collective bargaining agreement.

The Rhone-Poulenc Respondents also dispute the assertions that petitioners did not "intend" to surrender transfer rights when they executed the release in order to receive severance pay. The District Court correctly concluded that the release language included a release of the claims asserted by petitioners in this proceeding and that decision was affirmed by the Sixth Circuit.

ARGUMENT

The issues asserted by petitioners in this case do not raise a question where a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort, or has so far departed from the accepted and usual course of judicial

proceedings, or sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. Supreme Court Rule 10.1(a). Similarly, the issues raised by petitioners do not involve a decision by a United States Court of Appeals involving an important question of federal law which has not been, but should be, settled by this Court, nor did the court below decide a federal question in a way that conflicts with applicable decisions of this Court. The Petition for Certiorari should be denied.

A. The Court of Appeals correctly concluded that there was no breach of duty of fair representation by the respondents, International or Local Unions.

It is elementary that in order to sustain their claims against the respondents under Section 301 of the Labor-Management Relations Act, petitioners had to prove that there was both a breach of the duty of fair representation by the labor organizations who were parties to the collective bargaining agreement at issue and that there was a breach of the terms of those agreements by the Respondent employers. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 66-7, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981); *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342, 84 S.Ct. 363, 11 L.Ed.2d 370, 377 (1964). Failure to prove either element required dismissal of the plaintiff's claims. (*Id*). The District Court concluded that plaintiffs had failed to prove either element of their claim. (Appendix, A-145 through A-153). The Court of Appeals affirmed the dismissal of

petitioner's claims also finding no breach of the duty of fair representation. (A-15-16).

Petitioners' reliance on *Steele v. L&N Railroad Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944) is misplaced. There is no evidence in this case that the Respondent Local Union acted on the basis of racial bias or any other improper motive. The Local Union was placed between the proverbial "rock and hard place" in trying to represent the interests of two groups of its members whose interests were diametrically opposed. A "wide range of reasonableness must be allowed a statutory bargaining representative." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 75, 111 S.Ct. 1127, 113 L.Ed.2d 51, 63 (1991); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953). A union breaches its duty of fair representation only if its actions are arbitrary, discriminatory or in bad faith, and a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, its behavior is so far outside of a wide range of reasonableness as to be irrational. *O'Neill*, 499 U.S. at 67.

Petitioner's reliance on *Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138 (2d Cir. 1994) and *Aquinaga v. United Food & Commercial Workers*, 993 F.2d 1463 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 880; 127 L.Ed.2d 75 (1994) is also misplaced. In *Lewis*, the Court found that the Union had breached its duty of fair representation because of a secret agreement entered into between the Local Union President and the employer not to enforce a specific requirement for dovetailing seniority lists of companies acquired by the employer. The court concluded that the Union deliberately refused to process the

employees' meritorious grievance over the dovetailing provision. There is no evidence whatsoever in the instant case of any "secret" agreement by any officer of the Local Union with the Respondent employers nor of any arbitrary refusal of the Union to process a "meritorious" grievance.

Similarly, in *Aquinaga* the Union made a secret agreement with the employer allowing the company to shut down a plant whose employees were represented by the Union and reopen it as a non-union facility. The court concluded that the union " . . . not only failed to protect the plaintiffs' interest, it bartered away plaintiffs' means of protecting themselves and left the plaintiffs without representation." 993 F.2d at 1471. There are no facts in the instant case even close to those in *Aquinaga*.

There was no breach of the duty of fair representation by Local 912 so the Petitioner's § 301 action was properly dismissed under well-established legal precedent.

B. The District Court correctly held that performance of any obligation of the Rhone-Poulenc Respondents which may have existed under the cross-bumping agreement was excused by the doctrine of impossibility.

Although the Court of Appeals disagreed with the District Court's holding that the Rhone-Poulenc Respondents were excused from performing any obligation which may have existed under the cross-bumping agreement on the basis of the doctrine of impossibility or impracticability, the Rhone-Poulenc Respondents submit

that that decision was erroneous and that the District Court ruled correctly on that issue. Circuit Judge Contie, who dissented from the majority opinion, agreed with the District Court. (A-30).

The courts and commentators alike have recognized that a party's duty to perform a contract may be excused when such performance is impracticable. The doctrine of impracticability is an absolute defense to a breach of contract action and relieves the breaching party from any liability for damages. *See Restatement (Second) of Contracts*, § 261, illustrations 1 & 6. As set forth under the *Restatement (Second) of Contracts*,

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or circumstances indicate the contrary.
>
> *Restatement (Second) of Contracts*, § 261 (1981).

Although this rule is sometimes phrased in terms of "impossibility," a party's duty is discharged even though performance is not absolutely impossible. *See Restatement (Second) of Contracts*, § 261, Comment d (1981).

The doctrine of impracticability does not depend on, nor is it limited in, its application by the language of the contract. *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 826 F.2d 239, 262 (4th Cir. 1987); *see also Restatement (Second) of Contracts*, Introductory Note on Impracticability of Performance (1981). The doctrine is a "defense to an action for breach of contract" and is "essentially an

equitable defense" that rests solely "on the unfairness and unreasonableness of giving [the contract] the absolute force which its words clearly state." *Florida Power & Light*, 826 F.2d at 263 (quoting 18 *Williston on Contracts*, § 1931, p. 6).

When ownership of the furnace and organic plants was separated into two unrelated corporations, it became legally impossible for Rhone-Poulenc to force Zeneca (or ICI) to accept employees laid off from the furnace plant as its employees. Whatever obligation ICI may have had to accept the transfer of Rhone-Poulenc employees ended in June, 1991, when the 1982 memorandum agreement was removed from the collective bargaining agreement between ICI and Local 912. Once the furnace plant and organic plant were owned by completely separate corporations, the basic assumption underlying the memorandum agreement was destroyed and Rhone-Poulenc was discharged from any obligation thereunder. *See Eastern Air Lines, Inc. v. McDonnell-Douglas Corp.*, 532 F.2d 957, 991 (5th Cir. 1976) (the impracticability doctrine arises as a defense to breach of contract when "the circumstances causing the breach has made performance so vitally different from what was anticipated that the contract cannot reasonably be thought to govern"); *Green v. McGrath*, 662 F. Supp. 337 (E.D. Ky. 1986) (owner of a stallion who contracted with the owner of a thoroughbred mare to breed the horse was not liable for breach of contract after the stallion was kidnapped); *Waldinger Corp. v. CRS Group Engineers*, 775 F.2d 781 (7th Cir. 1985).

The majority of the Court of Appeals panel found that the "impossibility" doctrine did not apply since Rhone-Poulenc "knew" it could not perform under the

cross bumping agreement in 1988 when it negotiated a new contract with Local 912 " . . . in the sense that R-P could not force ICIA, a separate corporation with which it had no contractual ties, to abide by the cross bumping agreement." (A-14-15). However, "foreseeability" is not an issue in the applicability of the impossibility defense. *See, Restatement (Second) of Contracts*, Section 261, comment B at (c) (1981). Certainly, in 1988 when Rhone-Poulenc renegotiated its contract with Local 912, there is no way that it could have "foreseen" that ICI would agree with Local 912 to remove the cross bumping agreement from its contract with the union.

In short, Rhone-Poulenc had no obligation, or ability, to force Zeneca, or ICI, to accept its laid off employees. Its obligation under the cross bumping agreement was only to accept the transfer of employees laid off by ICI from the organic plant and permit its own employees to seek employment at the ICI plant if laid off from the furnace plant. Rhone-Poulenc did all that it was legally obligated or entitled to do.

Rhone-Poulenc assisted its employees who had been laid off to present their request to transfer to the ICI organic plant. Rhone-Poulenc did not, at any time, refuse to process any grievance filed by any of its laid off employees or the Local Union, but responded only that it could not compel ICI to accept the transfer of its employees once the cross bumping agreement had been eliminated from that employer's contract. The grievances filed by Rhone-Poulenc employees under the contract between Rhone-Poulenc and Local 912 were subsequently

withdrawn by the union and never advanced to arbitration.[3]

In short, there was no breach of contract by Rhone-Poulenc so that the District Court properly dismissed Petitioners' § 301 action and the Court of Appeals correctly affirmed that dismissal.

C. The Court of Appeals correctly ruled that there was no factual basis for Plaintiffs' conspiracy claim.

Tennessee courts recognize both a common law and statutory cause of action for civil conspiracy. Both require proof of a "combination between two or more persons to accomplish by concert an unlawful purpose or to accomplish a purpose, not in itself unlawful, by unlawful means." *Hardin v. Caldwell*, 695 S.W.2d 189, 191 (Tenn. Ct. App. 1985). Both require plaintiffs to first prove the existence of an underlying tort. *Forrest v. Stockstill*, 869 S.W.2d 328, 330 (Tenn. 1994). Failure to do so precludes recovery for civil conspiracy. *See, id.* ("If the [underlying] claim fails, then the claim for conspiracy must also fail, for '[i]t cannot be that a conspiracy to do a thing is actionable where the thing itself would not be.' " (citing *Felts v. Paradise*, 158 S.W.2d 727, 729 (Tenn. 1942)).

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[3] The Union obviously recognized the futility of pursuing those grievances to arbitration. There was no way for an arbitrator, deciding a grievance between Local 912 and Rhone-Poulenc, to require ICI to accept the transfer of Rhone-Poulenc employees.

To this end, petitioners contended that all of the respondents tortiously interfered with their asserted rights under the contract between ICI and Local 912 or between Rhone-Poulenc and Local 912. Petitioners failed to establish that: (1) a legal contract existed; (2) the wrongdoer knew of the contract; (3) the wrongdoer intended to induce breach; (4) the wrongdoer acted with malice; (5) a breach occurred; (6) the wrongdoer caused the breach; and (7) damages resulted. *Oak Ridge Precision Indus., Inc. v. First Tenn. Bank Nat'l Ass'n*, 835 S.W.2d 25, 29 (Tenn. Ct. App. 1992). A party cannot be held liable under this tort for interfering with a contract to which it was a party. *Koehler v. Cummings*, 380 F. Supp. 1294, 1313 (M.D. Tenn. 1971).

Petitioners failed to support their claim of tortious interference with contract, since Local 912 and Rhone-Poulenc were parties to one contract at issue and Local 912 and ICI were parties to the other. There was no evidence that either employer interfered with the other's contract.[4] Petitioners failed to prove that any defendant acted with actual malice. *See Testerman v. Tragesser*, 789 S.W.2d 553, 556-57 (Tenn. App. 1989) (failure to prove actual malice precludes a claim for tortious interference with contract). Similarly, there was no tortious interference with any contract by ICI when it agreed during the

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[4] Indeed, Rhone-Poulenc had no interest in seeing the cross bumping agreement removed from the ICI contract. If ICI had accepted the laid off Rhone-Poulenc employees under that agreement, Rhone-Poulenc would have avoided the expense of paying out several hundred thousand dollars in severance pay.

course of collective bargaining with its own employees to remove the cross bumping agreement.

As petitioners failed to establish their tort, an underlying claim for civil conspiracy also fails as a matter of law. The district court properly dismissed petitioner's state law conspiracy claims and the Court of Appeals correctly affirmed that dismissal. No issue is presented under this theory for this Court's disposition.

D. The Court of Appeals correctly held that the releases executed by certain of the Petitioners preclude their maintenance of this action.

The releases executed by the Petitioners stated:

> I hereby release the company from *any and all* pending and future obligations and liabilities to me arising out of employment with the company, except for any unemployment compensation or workers' compensation claims that I may make except as provided under the terms of the Memorandum of Understanding. (emphasis added).

The district court dismissed the claims against Rhone-Poulenc asserted by those plaintiffs who signed that release and received severance pay. The Court of Appeals affirmed that dismissal finding that the language of the release is clear and unambiguous, specifically informed the plaintiffs that they were waiving *any and all* claims against Rhone-Poulenc except for workers' compensation or unemployment compensation claims, and were supported by sufficient consideration in the form of severance pay. (A-21-2). The Court of Appeals also found

no basis for finding unconscionability or overreaching by Rhone-Poulenc. Petitioners cite no authority as any basis for the reversal of that decision.

No issue is presented under this theory for disposition by this Court.

CONCLUSION

There is no basis for the assertion of jurisdiction by this Court over the Petitioners' claims. The Petition for Certiorari should be denied.[5]

Respectfully submitted,

WILLIAM N. OZIER
Attorney for Respondents Rhone-Poulenc, Inc. and Rhone-Poulenc Basic Chemicals Co.

[5] The Rhone-Poulenc Respondents do not address Petitioners' claims against Zeneca, Inc. or the International Union since that those claims do not involve the interests of these respondents.